



January 9, 2017

VIA REGULATIONS.GOV

Board of Governors of the Federal Reserve System
ATTN: Katherine Wheatley, Associate General Counsel
20th & C Streets, NW
Washington, D.C. 20551

Re: Comment on Proposed FOIA Regulations, Docket ID: FRS-2016-0416-0001

I. Introduction

Pursuant to Section 553(c) of the Administrative Procedure Act ("APA"), Cause of Action Institute ("CoA Institute") hereby comments on the Board of Governors of the Federal Reserve System's ("Board") proposed Freedom of Information Act ("FOIA") regulations.¹

CoA Institute is a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.² In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. CoA Institute routinely requests records under the FOIA and disseminates its analysis of those records to the interested public by various means, including a frequently visited website, newsletters, press releases, news articles, Twitter, and Facebook. CoA Institute engages in extensive FOIA litigation and its lawyers have specific expertise with respect to the history, purpose, and application of the FOIA. CoA Institute routinely confronts the issues addressed in the following comments. It therefore respectfully requests that the Board consider these comments and amend its interim final rule accordingly.

II. Comments

a. 12 C.F.R. § 261.2(l) - Representative of the news media

The Board has failed to implement a definition of "representative of the news media" that is consistent with the FOIA statute.³ In 2015, the U.S. Court of Appeals for the District of

¹ Bd. of Govs. of the Fed. Reserve Sys., Rules Regarding Availability of Information, 81 Fed. Reg. 94,932 (Dec. 27, 2016) (to be codified at 12 C.F.R. pt. 261).

² See CAUSE OF ACTION INST., *About*, <http://www.causeofaction.org/about> (last accessed Jan. 9, 2017).

³ 12 C.F.R. § 261.2(l) ("Representative of the news media means any person actively gathering news for an entity that is *organized or operated* to publish or broadcast news to the public.") (emphasis added). The statutory definition does not include an "organized or operated standard." See 5 U.S.C. § 552(a)(4)(A) ("[T]he term 'a representative of the news media' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.").

Columbia Circuit issued an opinion in *Cause of Action v. Federal Trade Commission* that clarified the application of this statutory definition.⁴ The Board should take this opportunity to amend its FOIA regulations to bring its definitions into conformance with statutory and judicial authorities.

Specifically, the interim final rule fails to address an outdated definition that requires a news media requester to be "organized and operated to publish or broadcast news to the public[.]"⁵ The so-called "organized and operated" standard was created in guidance issued by the White House Office of Management and Budget in 1987.⁶ The D.C. Circuit in the *Cause of Action* case clarified that this outdated standard no longer applies because Congress provided a statutory definition of a "representative of the news media" in the OPEN Government Act of 2007: "Congress . . . omitted the 'organized and operated' language when it enacted the statutory definition in 2007. . . . [Therefore,] there is no basis for adding an 'organized and operated' requirement to the statutory definition."⁷

CoA Institute accordingly requests that the Board adopt the following definition of "representative of the news media," which tracks the FOIA definition:

§ 261.2 Definitions.

[. . .]

(l) "Representative of the news media" or "news media requester" means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.

b. Additional Matters

There are other elements of the DC Circuit's *Cause of Action* decision that also should be considered with respect to the news media requester fee category. First, the Board should incorporate the direction that the news media requester fee category determination focus "on the nature of the *requester*, not its request."⁸ To illustrate, "[a] newspaper reporter . . . is a representative of the news media regardless of how much interest there is in the story for which he or she is requesting information."⁹ Although a case-by-case inquiry into the articulated purpose of a request, the potential public interest in the requested material, or even the ability of a requester to disseminate the sought-after records rather than information in general may be appropriate in determining the eligibility of a nascent news media requester (i.e., a new entity that lacks a track record), nevertheless "the [FOIA] statute's focus [is] on requesters, rather than [their] requests."¹⁰ The Board's regulations should reflect this focus.

⁴ 799 F.3d 1108 (D.C. Cir. 2015).

⁵ 12 C.F.R. § 261.2(l).

⁶ Office of Mgmt. & Budget, Freedom of Information Fee Guidelines, 52 Fed. Reg. 10,012, 10,015 (Mar. 27, 1987).

⁷ *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d at 1125.

⁸ *Id.* at 1121.

⁹ *Id.*

¹⁰ *Id.*

Second, with respect to the requirement that a news media requester use "editorial skills" to turn "raw materials" into a "distinct work," CoA Institute directs the Board to the *Cause of Action* court's clarification that "[a] substantive press release or editorial comment can be a distinct work based on the underlying material, just as a newspaper article about the same document would be—and its composition can involve 'a significant degree of editorial discretion.'"¹¹ Although the mere dissemination of raw records would not meet the "distinct work" standard, even a simple press release commenting on records would satisfy this criterion. The Board's regulations should embrace this standard.¹²

Third, the *Cause of Action* court insisted that the statutory definition of "representative of the news media" captures "alternative media" and evolving news media formats.¹³ The court thereby provided a useful clarification about the interplay between evolving media and the news media dissemination requirement when it affirmed the *National Security Archive v. Department of Defense* rule that "posting content to a public website can qualify as a means of distributing it[.]"¹⁴ Although "[t]here is no doubt that the requirement that a requester distribute its work to 'an audience' contemplates that the work is distributed to more than a single person," "the statute does not specify what size the audience must be."¹⁵ With this in mind, the Board should indicate that the examples of news media entities it has included in its regulations are non-exhaustive.

¹¹ *Id.* at 1122.

¹² The *Cause of Action* court also addressed three related issues. First, the court articulated that the FOIA does not "require that a requester gather[] information 'from a range of sources' or a 'wide variety of sources.'" *Id.* at 1122. "[N]othing in principle prevents a journalist from producing 'distinct work' that is based exclusively on documents obtained through FOIA." *Id.* Second, with respect to the news media requester category dissemination requirement, the court provided a non-exhaustive list of the methods an agency must consider, including: "newsletters, press releases, press contacts, a website, and planned reports." *Id.* at 1124. Finally, the court addressed the so-called "middleman standard," rejecting the government argument that "a public interest advocacy organization cannot satisfy the [FOIA] statute's distribution criterion because it is 'more like a middleman for dissemination to the media than a representative of the media itself[.]'" *Id.* at 1125. The *Cause of Action* court rejected that argument because "there is no indication that Congress meant to distinguish between those who reach their ultimate audiences and those who partner with others to do so[.]" *Id.* These important clarifications should be considered for incorporation into a revised rule.

¹³ *Id.* at 1123; *see also* 5 U.S.C. § 552(a)(4)(A) ("These examples [of news-media entities] are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.").

¹⁴ *Cause of Action v. Fed. Trade Comm'n*, 799 F.3d at 1123.

¹⁵ *Id.* at 1124.

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III. Conclusion

Thank you for your consideration of the foregoing comments and proposed changes. If you have any questions, please do not hesitate to contact me at ryan.mulvey@causeofaction.org.

Sincerely,

A handwritten signature in blue ink that reads "Ryan P. Mulvey". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ryan P. Mulvey

COUNSEL